

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2131

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-2131

JAMES F. HEIMERLE,

PETITIONER-APPELLANT,

-7-

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY
Brief For Petitioner-Appellant

JAMES F. HEIMERLE
Appellant pro se
PMB 01673
Atlanta, Ga. 30315

TABLE OF CASES

	<u>Page</u>
<u>Alfano v. United States</u> , 555 F.2d 1128	12
<u>Beebe v. Vaughn</u> , 430 F.Supp. 1220	8,14
<u>Bye v. United States</u> , 435 F.2d 177	12
<u>Blackledge v. Allison</u> , 97 S.Ct. 1621 (1977).	4,15
<u>Davis v. United States</u> , 417us333	4,6,7,11,12,14
<u>Del Vecchio v. United States</u> , 556 F.2d 106	12,13
<u>Edwards v. United States</u> , 564 F.2d 652	passim
<u>Eizen v. Carlisle & Jacquelin</u> , 477 F.2d 1005 vacated on other grounds, 417us156	3
<u>Ex parte Lange</u> , 85 U.S. (18 Wall) 163.	5
<u>Ex parte Siebold</u> , 100us371	5,6
<u>Ex parte Watkins</u> , 28 U.S. (pet.)193	5,6
<u>Ex parte Wells</u> , 19 U.S. (18 How.) 307.	5
<u>Fernuson v. United States</u> , 513 F.2d 1011	12
<u>Frank v. Mangum</u> , 237us309	5
<u>Halliday v. United States</u> , 394us831.	12
<u>Hill v. United States</u> , 368us424.	passim
<u>Heimerle v. United States</u> , (76 Civ 4277-5669).	passim
<u>Heimerle v. United States</u> , (76 Civ 5563)	passim
<u>Johnson v. Zerbst</u> , 304us458.	23,24
<u>Kaufman v. United States</u> , 394us217	4,6,9,11
<u>Losinno v. Henderson</u> , 420 F.Supp. 380.	12
<u>Michel v. United States</u> , 507 F.2d 461.	12

<u>Moore v. Dempsey</u> , 261us86.	5
<u>Speed v. United States</u> , - F.Supp. - (T-76-10-C).	8,14
<u>Speed v. United States</u> , - F.2d - (77-1127)	1,8,14
<u>Stone v. Powell</u> , 425us465.	14
<u>Stroble v. Erelar</u> , 408 F.Supp. 630 rev'd & remanded on other grounds 547 F.2d 339	8,14
<u>Supal v. Lange</u> , 332us174	6,7,9,22
<u>Swain v. Pressley</u> , 97 S.Ct. 1224	4
<u>United States v. Alessi</u> , 544 F.2d 1139	3
<u>United States v. Blasius</u> , 397 F.2d 203	17,20
<u>United States v. Cyphers</u> , 556 F.2d 630	12,17,19,20,21
<u>United States v. Fischer</u> , 381 F.2d 509	10
<u>United States v. Ford</u> , 550 F.2d 732.	passim
<u>United States v. Hayman</u> , 342us205	4,14
<u>United States v. Loschiavo</u> , 531 F.2d659.	9
<u>United States v. McCarthy</u> , 394us459.	13
<u>United States v. Mauro</u> , 544 F.2d 588 cert. granted, 46 U.S.L.W. 3183	passim
<u>United States v. Travers</u> , 514 F.2d1171	12
<u>United States ex rel. Esola v. Groomes</u> , 520 F.2d 830	8,13,14
<u>Waley v. Johnson</u> , 316us101	5,6
<u>Western Pacific Ry. Corp. v. Western Pacific Co.</u> , 343us247	3

TABLES OF AUTHORITIES

	<u>Page</u>
H.R. Rep. 308, 80th Cong., 1st Sess. (1947)	4
Hart, <u>Foreword, The Time Chart of the Justices,</u> 73 Harv. L. Rev. 84 (1959)	4
Oakes, <u>Legal History in the High Court —</u> <u>Habeas Corpus,</u> 64 Mich. L. Rev. 451 (1966)	4, 5
Note, <u>Developments in the Law — Federal</u> <u>Habeas Corpus,</u> 83 Harv. L. Rev. 1038 (1970)	5, 11, 22
Sator, Shapiro, Mishkin & Wechsler, <u>Hart &</u> <u>Wechsler's The Federal Courts and the</u> <u>Federal System (2d ed. 1973)</u>	7

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x

JAMES F. HEIMERLE,

Petitioner Appellant

-v.-

UNITED STATES OF AMERICA,

Respondent-Appellee

----- x

REPLY BRIEF OF DEFENDANT-APPELLANT
JAMES F. HEIMERLE

The government fails to meet any of petitioner-appellant's points on appeal and, in the course of responding, relies primarily upon the decision Edwards v. United States, 654 F.2d. 652.

The government submits a piece of paper in their appendix referred to as Notice of Readiness For Trial (G. App. 1). Since this piece of paper is not signed by anyone or entered in the docket sheet, nor for that matter, filed with the Clerk of the District Court. It therefore cannot be received as authentic — and should be totally disregarded. See Rule 902, Federal Rules of Evidence. cf. fourth entry docket sheet 72 Cr 1331.

The government persists that they were not served with papers in regard to Judge Brieant's first memorandum and order, dated December 15, 1976, however, this contention is not supported by Judge Brieant's later opinion, wherein he advises that:

" the government did not wish to answer"
(H. App. 22)

Based on the government's position in regard to violations of the Agreement as it stood at that time -- it is no wonder that they "did not wish to answer" when, of course, coupled with the fact that on November 22nd 1976 - Washington, Department of Justice - consented to setting free a defendant that had pled guilty and was serving a twenty-five year sentence; for violating said defendant-prisoner's rights under the Agreement. See Affidavits; appended hereto, of Judge Terry Shell, United States District Judge, and licensed practicing attorney at law, Robert Pierce. The facts and circumstances are indistinguishable between those and the instant case. And certainly, thirteen working days and an approximate distance of one thousand miles does not warrant different results. When, of course, the enforcement of a national law is at stake.

"We cannot permit a district judge who is an officer of a national judicial system and who is enforcing a national criminal code to be moved by such considerations of parochialism"
(United States v. Diamond, 561 F.2d. 557[4])

If a district judge cannot enforce a national code disparitly. Now, then, can the Department of Justice do so? To allow such arbitrary and invidious enforcement of a national code is not within the Equal Protection Clause of the United States Constitution. And accordingly, Heimerle submits that the decision and order of July 6, 1977 should be reversed and the order of December 15, 1976 be ordered reinstated by this Court.

It should be Judicially Noticed that while the government submitted an appendix with the writs ad prosequendum for the Courts convenience. The government has deliberately avoided the writ ad prosequendum that initiated both prosecutions, nor, for that matter, did the government supply the initial writ ad prosequendum in appeal no. 77-2119. Which is presently before the Court. The absence of this particular writ ad prosequendum is indeed, significant. That is, should the order of the Court below in 77-2119 be affirmed -- well, then, the dual arraignment, and voice exemplar proceedings being inseparable -- should compel reinstatement of the December 15th 1976 order of the Court below. However, if in the event the Court reverses the order of the Court below in 77-2119. It is submitted that this Court must rule upon the merits of the denial of the speedy trial rights in the instant case -- as guaranteed under Article IV(c) of the

Interstate Agreement on Detainers. See United States v. Ford, 550 F.2d. 732.

Turning now to the Court's opinion in Edwards, supra; appellant respectfully urges this Court to reconsider the decision in Edwards. cf. United States v. Alessi, 544 F.2d. 1137, 1143-44 (2 Cir 1976), reconsideration of a recent decision of the Court where relevant case law had not been cited to the original panel.

In the alternative, appellant respectfully suggests a hearing or rehearing en banc on this issue. See Western Pacific Ry. Corp v. Western Pacific Co., 345us247, 259 (1953). En Banc consideration is appropriate here, the issue involved is of great significance to a class of litigants, the panel whose decision has become law of the Circuit reached a questionable result, other jurisdictions have disagreed with the panel's ruling, and en banc consideration would be necessary to maintain uniformity of decisions in the Circuit. See 9 J. Moore, Federal Practice p.235.02 at 4103 (2d ed. 1975); Eisen v. Carlisle & Jaquelin, 479 F.2d. 1005, 1021-26 (2d Cir 1973) (Oakes, J. dissenting from denial of rehearing en banc), vacated on other grounds, 417us156 (1974). Although United States v. Mauro, 544 F.2d. 588, and Ford, supra are being heard by the Supreme Court, both of those cases are direct criminal appeals and do not raise the issue concerning § 2255 presented herein. Compare Eisen, supra at 1020-21

The decision in Edwards applies dicta from Supreme Court cases to reach a conclusion that neither the Supreme Court nor this Court has ever before reached: that the courts may decline to consider a claim that a person is in custody in violation of a clear and unequivocal law of the United States if the courts disagree with Congress' judgment about the importance of the law.

A. Background — The Scope of Habeas Corpus Jurisdiction

28 U.S.C. 2255, in pertinent part, states that a motion to vacate sentence may be made by a federal prisoner

claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack....

This provision was intended to supply a statutory substitute for the writ of habeas corpus, and its scope was intended to be exactly commensurate with the scope of the writ. See H.R. Rep. 308 at A180, 80th Cong., 1st Sess. (1947); Blackledge v. Allison, 97 S.Ct. 1621, 1629n4 (1977); Swain v. Pressley, 97 S.Ct. 1224, 1228 (1977); Davis v. United States, 417us333,343 (1974); Kaufman v. United States, 394us217, 222 (1969); United States v. Hayman, 342us205, 210-19 (1952). As many commentators have noted, judicial interpretation of the scope of jurisdiction in collateral proceedings has undergone a steady expansion. See Hart, Fore-

word, The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959); Oaks, Legal History in the High Court — Habeas Corpus, 64 Mich. L. Rev. 451 (1966); Note, Developments in the Law — Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) [hereinafter "Developments"].

Earliest constructions of the scope of habeas corpus review are exemplified by Chief Justice Marshall's statement in Ex parte Watkins, 28 U.S. (3 Pet.) 193, 203, 7 L. Ed. 650, 653 (1830):

An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

Gradually, the courts expanded the definition of what constituted a jurisdictional defect, rendering habeas corpus relief more broadly available, see Ex parte Wells, 59 U.S. (18 How.) 307 15 L.Ed. 421 (1855); Ex parte Lange, 85 U.S. (18 Wall) 163, 21 L. Ed. 872 (1874); see also Moore v. Dempsey, 261 U.S. 86, 67 L.Ed. 543 (1923); Frank v. Mangum, 237 U.S. 309, 59 L.Ed. 969 (1915); Developments, supra at 1045 et seq. In Ex parte Seibold, 100 U.S. 372, 25 L.Ed. 717 (1880), the Court concluded that a challenge to a conviction on constitutional grounds was cognizable on habeas corpus. And in Waley v. Johnson, 316 U.S. 101, 104-05 (1942) the Court acknowledged that the concept of jurisdictional defects no longer delimited the scope of review in collateral attacks.

Throughout this process of expansion, the Supreme Court viewed each case on its facts and, of necessity, often discarded or disregarded dicta in earlier cases which would have seemed to indicate that each new claim raised was not cognizable. In considering a claimed jurisdictional defect, the Court would frequently state that nonjurisdictional defects might not be raised on collateral attack but, where a nonjurisdictional defect was subsequently presented, the Court analyzed the novel claim with regard to the ultimate purposes of the habeas corpus statute and the facts of the case, rather than considering itself bound by earlier dicta. Compare Watkins, supra, with Siebold, supra, and Walley, supra.

More recently, in Kaufman v. United States, supra, the Supreme Court held that a constitutional claim may be raised for the first time in a § 2255 proceeding, despite earlier dicta to the effect that "the writ of habeas corpus will not be allowed to do service for an appeal." Sunal v. Larue, 332us174, 178 (1947). The Kaufman Court distinguished Sunal on its facts, explaining that Sunal had involved a nonconstitutional claim, and treating the apparently broad statement in Sunal as limited in application to the facts of the case.

Similarly, in Davis v. United States, supra, the Court again

distinguished earlier cases which, if read literally, would seem to preclude the statutory claim found cognizable therein. Id. at 345-47. Prior to Davis, both commentators and courts had concluded that under Sunal, supra, and Will v. United States, 368us424 (1962), claims not based on the Constitution or on jurisdictional defects could not be raised on § 2255 motions. See Bator, Shapiro, Mishkin & Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, 1529-31 & 1531n9 (2d ed. 1973).

Because of the Court's process of expansion and distinction of earlier cases, habeas corpus law is rife with dicta which can be taken out of context to justify exclusion of virtually any claim from consideration on its merits. However, the Supreme Court's approach to interpretation of the scope of habeas corpus, and general principles of statutory construction, show that the touchstones of analysis of novel claims raised on § 2255 motions must be § 2255 itself, the factual contexts of earlier cases, and the nature of the claim raised.

E. The Claim that Petitioner-Appellant is in Custody in violation of a law of the United States Must be Cognizable Under Section 2255.

Section 2255 by its clear and unequivocal language allows challenges to convictions on the ground that custody is in violation of the "laws of the United States." The Interstate Agreement on Detainers is unquestionably a "law of the United States." See Edwards, supra, supra, at n 2. In Davis, supra, the Supreme Court held that, despite earlier dicta, claimed violations of +

"laws of the United States" may be raised on § 2255 motions. Moreover, in every reported decision discovered by appellant, other jurisdictions uniformly have disagreed with the Edwards court and have found that a claim under the Interstate Agreement on Detainers is cognizable on habeas corpus as a claim of custody in violation of a law of the United States. United States ex rel. Esola v. Croones, 520 F.2d. 830, Heimerle v. United States, ___ F. Supp. ___ (6/22/77 Dkt.No. 76 Civ 5669, Carter, R.L., S.D.N.Y.); Heimerle v. United States, ___ F. Supp. ___ (12/15/76 Dkt.No. 76 Civ 5563, Bricant, C.L., S.D.N.Y.); Speed v. United States, ___ F. Supp. ___ T-76-10-C, 12/15/76,) appeal dismissed due to government's motion, Speed v. United States, 77-1126, ___ F.2d. ___; Beebe v. Vaughn, 430 F. Supp. 1220 (D.Del.1977); Stroble v. Egeler, 408 F. Supp. 630 (E.D.Mich.1976), rev'd & remanded on other grounds, 547 F.2d.339 (6th Cir 1977).

The Edwards court did not dispute any of these simple propositions. The sole justification offered for the result in Edwards was dicta from Hill v. United States, supra at 428, which the Edwards court chose to interpret as a "gloss" on the language of § 2255. Edwards, supra. According to the Edwards court, a claim that a conviction was imposed in violation of a law of the United States or is otherwise subject to collateral attack, may be raised in a § 2255 motion only if the alleged error const-

itutes a "fundamental defect which inherently results in a complete miscarriage of justice" and presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.*, quoting Hill, *supra* at 428, *

While Hill does indeed contain the quoted language, these comments have never been presented or used by the Supreme Court as a blanket limitation on the availability of the remedy provided by § 2255. In addition, the guidelines set forth by Hill are most logically interpreted as an attempt to define the meaning of the phrase "otherwise subject to collateral attack" — the catchall phrase of § 2255 — and should not apply to impose obstacles to asserting a violation of a clear "law of the United States." Finally, the rationale of Hill, that some claims are not of the "character or magnitude" appropriate for consideration on §2255 motions, does not justify precluding a claimed violation of a law whose significance has already been judged by Congress.

1. The Applicability of Hill

The Edwards Court suggested that the dicta from Hill are guidelines giving content to the "murkey language" of § 2255 that

* The question considered in Edwards was not whether the court has jurisdiction to hear certain claims on § 2255 motions. It is clear that the courts have power to hear the claim, and that any limitations imposed are only standards guiding the exercise of the court's discretion. See Kaufman, *supra* at 220n3; Sunal, *supra*, at 179-80; United States v. Loschiavo, 531 F.2d.659,666 (2d Cir 1976)

the motion may be used to raise a claim that a conviction was in violation of "laws of the United States" or "otherwise subject to collateral attack" *Id.* Guidelines are indeed necessary to define the meaning of "otherwise subject to collateral attack," but "laws of the United States" cannot fairly be characterized as a murky phrase. Hill, which involved an alleged violation of a rule of criminal procedure, should be interpreted as a construction of the meaning of "otherwise subject to collateral attack" cf. *United States v. Fischer*, 381 F.2d. 509, 512 (2d Cir 1967), cert. denied, 390us973 (1968), and its guidelines should not even apply where a violation of the "laws of the United States is asserted."

The claim raised by petitioner Hill was a technical denial of his right to allocution under F.R. Crim. P. 32(a), in that the trial judge had neglected to ask him personally whether he wished to speak before being sentenced. Hill did not allege that the trial judge in any way prevented him from speaking, or that he had anything he wished to say on his own behalf. *Id.* at 429. The Court, concerned with deterring a flow of motions to vacate sentence or motions for new trials based on trivial errors or at sentence, decided that the error Hill asserted was too superficial to warrant

* The government continuously asserts that Heimerle moved for withdrawal of his plea and a dismissal of the indictment, see G. Br. p. 3 n*. — the statement is factually incorrect.

relief on collateral attack. The Court, noting that Hill had not alleged an affirmative denial of his right of allocution, stressed that it was not deciding whether a true violation of Rule 32(a) would be found to state a cognizable claim under § 2255. *Id.* at 429; Developments, supra at 1068-69. In the course of concluding that this merely "formal" failure to comply with procedural requirements of Rule 32(a) was not sufficient ground for vacating Hill's sentence, the Court indicated that its decision might have been different if the asserted error had been constitutional or jurisdictional, if the error had engendered a fundamental defect resulting in a miscarriage of justice, or if exceptional circumstances had been present. *Id.* at 428.

The Court did not state that all of these factors — or any one of them — were necessary features of a claim cognizable on a § 2255 motion. These general statements of guidelines which would entitle a claim to consideration were not presented as an exclusive list of the only circumstances under which a claim would be considered. Since Hill was decided, the Supreme Court has never used these comments as a basis for precluding a claim from consideration. These dicta have been quoted in Supreme Court cases where relief was granted under § 2255. Davis, supra, Kaufman, supra.

There is little case law in the Supreme Court or in this Circuit considering actual violations of "laws of the United States,"^{**} Most cases brought under § 2255 raise constitutional claims, or claims relating to violations of the rules of criminal procedure.^{**} Cf. Losinno v. Henderson, 420 F.Supp. 380, 383 (S.D.N.Y. 1976). Thus, cases in this Court discussing the scope of § 2255 have involved claims which would fit into the catchall phrase of § 2255 -- "otherwise subject to collateral attack." Most of these cases have dealt with the question of application of court-made rules and constructions. In Alfano v. United States, 555 F.2d 1128 (2d Cir. 1977), for example, the Court declined to apply a court-made exclusionary rule on a 2255 motion when the result would have been to allow petitioner a new trial merely because there had been a delay in the sealing of wiretap evidence used at trial.

* Cases in this Circuit decided before Davis, *supra*, had concluded that a nonconstitutional, nonjurisdictional claim could never be raised on a § 2255 motion. See, e.g., U.S. v. Spada, 331 F.2d 995 (1964), *cert. denied*, 379us865 (1965). Since Davis, the Court has recognized the growth of the law in this area. See, e.g., U.S. v. Travers, 514 F.2d 1171, 1173 (2d Cir 1974). The Court has also been receptive to other nonconstitutional, nonjurisdictional claims. In Del Vecchio, 556 F.2d 106, the Court left open the question of whether violations of Fed. R. Crim. P. 11 are cognizable on § 2255 motions, *id.* at 110, acknowledging that the Circuit has in the past considered claimed violations of Rule 11 on § 2255 motions, see Ferguson v. U.S., 513 F.2d 1011 (2d Cir 1975); Michel v. U.S., 507 F.2d 461 (2d Cir 1974); Bye v. U.S., 435 F.2d 177 (2d Cir 1970), as has the Supreme Court, see Halliday v. U.S., 394us831 (1969).

** Claims of violation of these rules cannot often be raised successfully on collateral attack because the F.R.Crim.P. carry their own waiver rule, Rule 12, which generally precludes later assertion of claims not raised pretrial. The Interstate Agreement on Detainers, of course, is not governed by Rule 12, see Cyphers, 556 F.2d at 634.

In Del Vecchio v. United States, 556 F.2d 106 (2d Cir. 1977), the Court decided not to expand application of the rule of United v. McCarthy, 394us459 (1969) (where the Supreme Court established a stringent penalty for failure to comply with the procedural requirements of Fed. R. Crim. P. 11) to a § 2255 petitioner who had not been advised of certain consequences of his guilty plea. In both these cases, the Court determined that the propylactic purposes of these rules could not be raised on collateral attack. In such circumstances, where the courts are defining the scope of a vague provision of § 2255 and implementing court-made rules, the guidelines derived from Hill are both necessary and helpful. But this proper exercise of judicial discretion does not justify using these guidelines to impose barriers to consideration of violations of "laws of the United States" where Congress has not imposed any such limitations.

Other courts to have considered the claim raised in Edwardia have reached this conclusion. The third Circuit, in Esola, supra, found that an asserted violation of Article IV(e) of the Agreement was a claim of violation of the laws of the United States, considered the claim on the merits, and granted relief. The court did not impose any additional requirements that petitioner show a complete miscarriage of justice, but deemed it sufficient that he had

established a violation of a law of Congress." See *id.* at 834-35. In Beebe, *supra*, and Stroble, *supra*, Heimerle, *supra*, and Speed, *supra*, the courts reached the same result, on the basis of the same straightforward analysis. Cf. Wingo v. Ciccone, 507 F.2d 354, 357n11 (8th Cir 1974). All of these cases were federal habeas corpus petitions brought by prisoners on the ground that a state** had violated their rights under the Agreement. The scope of jurisdiction under § 2255 is exactly commensurate with the scope of jurisdiction under § 2254, see Davis, *supra*, 343; Hayman, *supra*, 210-19, so a claimed violation of a law of the United States which may be raised by a state prisoner necessarily may be raised by a federal prisoner. In fact, considerations of comity pose greater reason to decline to consider claims raised by state prisoners based on a state's violation of their rights. See Stone v. Powell 428us465 (1976).

Thus, the Edwards Court imposed novel restrictions upon consideration of asserted violation of laws of the United States which other courts have found unnecessary and inappropriate, even where the claim is raised by a state prisoner. The Supreme Court has recently expressed its disfavor of blanket rules designed to

* This Court, in Mauro, *supra*, endorsed the reasoning of the Third Circuit in Laola, following that court's interpretations of the Interstate Agreement on Detainers.

** Mauro, *supra*, held: the United States is a State for the purposes of the Interstate Agreement on Detainers.

preclude consideration on the merits of claims raised on collateral attacks, see Blackledge, supra at 1629.* The Hill dicta, applicable to aid the courts in determining which claims are "otherwise subject to collateral attack," cannot, consistent with the weight of authority in other jurisdictions, be taken as a license to eschew consideration of a violation of a law of the United States.

2. The Nature of the Right Asserted

Even if Hill is not interpreted as an attempt to define "otherwise subject to collateral attack," and is construed as applying to claims involving "laws of the United States," the claim under Article IV(e) of the Interstate Agreement on Detainers is properly heard under the rationale of Hill, because it is not a trivial error of the type deplored therein. Hill appears to be the only occasion on which the Supreme Court declined to hear a claim on the ground that the asserted claim was not of the "character or magnitude," id. at 428, warranting relief on collateral attack. This decision was based on the conclusion that Hill had not alleged a true violation of his right of allocution under Rule 32(a).

The superficial nature of Hill's claim for relief can be clarified by considering what would have happened had the Court

* "In administering the writ of habeas corpus and its 2255 counterpart, the federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were...the product of [impermissible] factors..." Id.

granted his motion. Hill's sentence would have been vacated, and he would have undergone a new sentencing procedure at which the trial court would have inquired whether he wished to say anything on his own behalf. It appeared, from the papers Hill has submitted to the courts on his § 2255 motion, that Hill did not have anything to say. Thus, by denying Hill's motion, the Court merely declined to afford Hill what was destined to be nothing more than a meaningless and unnecessary repetition of his sentencing proceeding.

Violation of Article IV(e) of the Interstate Agreement on Detainers, by way of contrast, is not a hollow or insignificant claim. It is both unnecessary and inappropriate for the courts to assess the importance of the right granted by this section, because Congress has already done so. As this Court recognized in Mauro, supra, and Ford, supra, the legislative history of the Agreement reflects Congress' concern with the difficulties engendered by transfers of custody effected without the beneficial provisions of the Agreement. Article IV(e) is exceptionally clear and unequivocal in its commands, and the sanction imposed for violation of its terms is both mandatory and harsh. The applicable principles of statutory construction compel the court to give effect to Congress' clear statement of its intent. First, "[t]here is a presumption against construing a statute as containing super-

fluous or meaningless words or giving it a construction that would render it ineffective." *United States v. Blasius*, 397 F.2d 203, 207n9 (2d Cir 1968)(citations omitted), cert. dismissed, 393us1004 (1969). Further, Article IX of the Interstate Agreement on Detainers itself provides that the Agreement "shall be liberally construed so as to effectuate its purpose." See United States v. Cyphers, 556 F.2d 630, at 635. Even if the courts believe that Congress erred in providing so harsh a sanction for violation of Article(IV(e), it is not the court's role to "extricate the United States from the unequivocal terms of the Agreement enacted by the Congress." Mauro, supra, at 595; see Ford, supra, at 744.

Heimerle suffered precisely the series of events Congress prohibited in Articles IV (e) and (c): he was brought from state to federal custody for trial on no less than five (5) occasions over a period of no less than five hundred sixty five (565) days. Accordingly, Indictment 72 Cr 1331 thereupon lost all "force and effect" and the COURT was required to enter an order dismissing the indictment. Had the District Court or Court of Appeals considered this violation of Articles IV (e) and (c) during the original criminal proceeding, it is clear that the indictment would have been properly dismissed. The fact that Heimerle did not specifically raise this claim during an earlier proceeding does not reflect upon the importance of the claim. The question of

whether this claim is properly raised on a § 2255 motion should focus only on the question of whether the claim should be deemed to have been waived.

Thus, Heimerle's claim is not precluded from consideration on § 2255 as a trivial or hollow claim under the rationale of Hill because Heimerle has suffered a clear loss of the rights guaranteed by Articles IV(e) and (c), and Congress has already deemed those rights substantial enough to warrant strong sanctions.

In sum, precedent affords no justification for imposing tests of substantiality or prejudice which must be passed before a violation of a law of the United States may be raised on a § 2255 motion. The Hill dicta are not exclusive tests; the rationale of Hill should not apply to a clear claim of violation of a law of the United States, rather to a conviction "otherwise subject to collateral attack;" and Hill itself is highly distinguishable where the claim at issue is a violation Congress has judged to be substantial.

C. The Claim That the Court Was Without Jurisdiction to Impose Sentence on Petitioner-Appellant Must be Cognizable Under Section 2255.

In the instant case, the court was without jurisdiction to impose sentence on petitioner on Indictment 72 Cr 1331. The plain and unequivocal language of Articles IV(e) and (c) provides that upon violation of the Article's terms, the indictment "shall not

be of any further force or effect, and the COURT shall enter an ORDER dismissing the same with prejudice." As this Court indicated in Cyphers, supra, at 635, this section, by its very language, appears to be self-executing. No defense motion is required to claim a remedy under Article IV(e) and (c). There are no contingencies, no procedural requirements, and no exceptions written into Article IV (e) and (c). The only possible construction of the statute is that the indictment loses all force and effect when Article IV(e) or (c) is violated, not when such claim is presented to the court, and that the court is required to dismiss the indictment whenever such violation is discovered. If the indictment had no force or effect, the court could not have had jurisdiction to accept the guilty plea and sentence Heimerle.

The jurisdictional nature of the claim herein is demonstrated by this Court's decision in Cyphers, supra; in that case, appellant Ferro raised, on his direct criminal appeal, the same claim raised herein — that he had been transferred from state to federal custody twice before his federal trial, in violation of Article IV(e), see *id.* at 634. In the instant case it must be remembered — the Court failed to dismiss the indictment, when it was factually compelled — no less than five (5) times, over a period five times in excess of the mandate of Article IV(c). The gov-

ernment argued that he should not be permitted to raise this claim for the first time on appeal. The Court found that Ferro had not waived his claim by failing to raise it in the District Court, explaining that Article IV(e) does not impose any requirement that a defendant request relief. *Id.* at 634-35.

On finding that appellant Ferro had stated a violation of Article IV(e), the Court of Appeals simply ordered the indictment dismissed with prejudice. *Id.* at 635, 637. The Court did not remand the claim for the District Court's consideration, or even to allow the District Court the opportunity to order the indictment dismissed. This action implies that violation of Article IV(e) imposes a bar to prosecution, such that any court with jurisdiction over the offense must order dismissal as mandated by Article IV(e) whenever such violation is discovered. This would also apply to violations of Article IV(c). See also Ford *supra* at 743-44.

The language of Article IV(e) and (c) is most naturally interpreted as creating a bar to prosecution. Any other construction would impose restrictions and requirements which Congress did not endorse, and would change the meaning of the section. See Blasius, *supra*. Further, Article IX of the Agreement mandates liberal construction. See Cyphers, *supra* at 635.

Thus, in addition to raising a claim under § 2255 that petit-

isoner-appellant is in custody in violation of a law of the United States, Heimerle's claim herein should be cognizable as a jurisdictional defect.

III. Petitioner-Appellant's Claim Has Not Been Waived.

A. Petitioner-Appellant Did Not Deliberately Bypass His Procedural Remedies.

In Cyphers, supra, this Court determined that a claim under Article IV(e) is not waived by failure to raise the claim in the District Court. Id. at 634-35. The Court explained that a claim under the Agreement is not governed by the waiver provision of Rule 12(f) of the Fed.R. Crim. P. Id. at 634. Noting that Article IV(e) "makes no reference to a request by the prisoner and says 'if trial is not had on any indictment ... prior to the prisoner's being returned to the original place of imprisonment . . . such indictment . . . shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice,'" the Court concluded that appellant could raise his claim for the first time on appeal. Id. at 634-35.

Thus, Heimerle did not waive his claim by failing to raise it in the District Court during the underlying criminal proceeding. As Judge Brieant correctly noted:

The prior opinion [December 15, 1976] of this Court was correct, insofar as it goes. Certainly a

waiver is nothing more than the intentional relinquishment of a known right, and there was no waiver on Heimerle's part simply by the fact that he permitted the successive writs ad prosequendum to be satisfied, and was returned to the Ossining Correctional Facility without protest on his part.

Factually, Judge Carter used the identical words when granting the relief sought in Heimerle, supra, for violations that antedate the in absentia arraignment of the instant case in the District Court before Judge Bricant. However, the violations go on to be more flagrant in the instant case. Cf. (Docket sheets H. App.)

Further, Judge Bricant went on to state:

Here, Heimerle lost out with respect to a right which no person skilled in the law then would have imagined existed in his favor.

Commentators have suggested that the deliberate bypass standard should be applied to favor consideration of any claim of an inherently personal right. See Developments, supra at 1111. This is so because there can be no plausible strategic reason for failing to raise such claims during trial or direct appeal. The only conceivable reason for not raising such a claim is ignorance of the claim. Therefore, the policy of deterring piecemeal litigation, the aim of Spaul, and the deliberate bypass rule, cannot be furthered by refusing to hear such claims at a later proceeding. While litigants can be deterred from purposely withholding claims for strategic reasons in the expectation that they will be able to

raise them in a later proceeding, there is no deterrent function served where a procedural default was inspired only by ignorance. Thus, the courts should hear claims on collateral attack despite a forfeiture by counsel " if it appears that there was no strategic motive for the bypass and that the petitioner did not knowingly acquiesce in the decision." Developments, *supra* at 1112.

The question of whether failure to raise a claim was deliberate is a factual question and the District Court herein found, without an evidentiary hearing, that Heimerle did not waive his rights under the Interstate Agreement — knowingly, intelligently, and voluntarily, see December 15, 1976 and July 6, 1977 opinions of Judge Briant. Cf. opinion of Judge Carter rendered June 22, 1977 (relief granted on basis of dual arraignment).

It is submitted that collateral relief should not be foreclosed simply because this indigent litigant was unaware of his potential legal claims that "no person skilled in the law then would have imagined existed in his [Heimerle's] favor." In any event, a plea of guilty entered when an ABSOLUTE defense existed could not have been knowing, intelligent, nor voluntary.

In Manro, supra, at 591n3, this Court stated that ANY purported waiver of rights guaranteed by Article IV(e) of the Interstate Agreement on Detainers IS to be judged by the familiar standard of Johnson v. Zerbst, 304us438, 464 (1938): "it must have been an intentional relinquishment or abandonment of a KNOWN right

or privilege." Mauro itself provides an example of the application of this standard. In Mauro, appellee Fusco personally, in open court, requested that he be returned to state custody prior to his federal trial. The Government charged that Fusco had thereby waived his rights under Article IV(e). This Court found that Fusco's action did not constitute a waiver because the record was "barren of any indication" that Fusco's request had been an intentional relinquishment or abandonment of a KNOWN right. Id at 591n3. See Judge Briceant on Heimerle's rights p. 22 supra.

In this case, the record is not silent on the question of whether Heimerle knowingly or intelligently relinquished a known right — the District Court found as a matter of fact that he did not. And yet, however, the District Court found that although Heimerle did not know what he was waiving — nor did Heimerle's lawyer — Heimerle waived that right nevertheless.

The District Court's finding of fact in the opinion of December 15, 1976 was clearly correct. There was ample basis for concluding that the Johnson v. Zerbst standard was not met and that Heimerle did not waive his rights under the Interstates Agreement on Detainers, as evinced by the government's position regarding the Interstate Agreement on Detainers on that date — showing ample reason why they "did not wish to answer" — see appended affidavits referred to at page 2 supra.

The District Court incorrectly granted reargument and vacated his order and decision of December 15, 1976 based on the erroneous grounds that Heimerle waived whatever rights he had in regard to the Interstate Agreement on Detainers — while at all times, during both opinions — adhering to the fact that at NO TIME did Heimerle waive the right that NO ONE knew existed.

It is submitted that the order and decision of July 6, 1977 must be reversed and vacated and the order and decision of December 15, 1976 must be reinstated.

CONCLUSION

FOR THE REASONS STATED, THE DISTRICT COURT'S ORDER DENYING HEIMERLE'S MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255 SHOULD BE REVERSED OR AT THE VERY LEAST, REMANDED FOR A HEARING ON THE SPEEDY TRIAL RIGHTS THAT WERE GUARANTEED UNDER THE INTERSTATE AGREEMENT ON DETAINERS.

Dated: Atlanta, Georgia
February 9th 1978

Respectfully submitted,

James F. Heimerle
petitioner-appellant
pro se
PMB 01073
Atlanta., Ga. 30315

17

77-2131

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-2131

3
FJS

JAMES F. HEIMERLE,

PETITIONER-APPELLANT

-V.-

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF'S APPENDIX
For Petitioner-Appellant



JAMES F. HEIMERLE
Appellant pro se
PMB 01873
Atlanta, Ga. 30315

INDEX TO APPENDIX

Page

Motion for Remand Back to District Court IN RE <u>Speed v. United States</u> , (77-1126)	1
Affidavit; Robert Pierce, Attorney at Law	3
Affidavit; Terry Shell, United States District Judge	6

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

FILED
APR 20 1977
ROBERT C. TUCKER
CLERK

ERNEST RICHARD SPEED, JR.,

PETITIONER,

VS.

NO. T-76-10-C

77-1126

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION TO REMAND TO
UNITED STATES DISTRICT COURT

Comes Ernest Richard Speed, Jr., by his attorney,
Donald S. Ryan, and for his motion, states:

I.

That the order entered in this case by United States
District Judge Terry L. Shell on December 15, 1976, did
not adequately reflect that the order was with the full
consent of the United States Government.

II.

That this case should be remanded to the United States
District Court, Western Division of Arkansas, Texarkana
Division, so that the order may be amended and corrected in
order to properly reflect that it was, in fact, a consent
judgment.

III.

Attached hereto is an affidavit from Robert L. Pierce,
former attorney for the petitioner and an affidavit from
United States District Judge Terry L. Shell, stating that
the United States did consent to the granting of the
petition of Ernest Richard Speed, Jr.

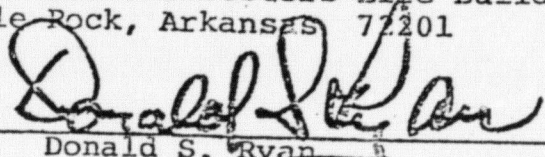
IV.

April 27, 1977. That pending a determination of this petition, the necessity of filing a reply brief should be held in abeyance.

WHEREFORE, Petitioner prays that his motion be granted.

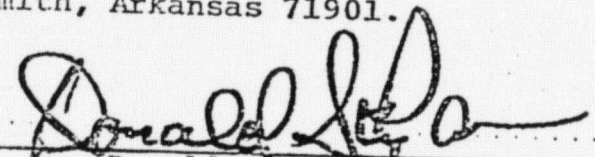
DODDS, KIDD & RYAN
205 National Investors Life Building
Little Rock, Arkansas 72201

By


Donald S. Ryan
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Donald S. Ryan, hereby certify that I have this 18th day of April, 1977, mailed a copy of the foregoing to W. Wayne Buckner, Appeals Expediter, U.S. Court of Appeals, St. Louis, Missouri 63101; Mr. Robert C. Tucker, Clerk; U.S. Court of Appeals, St. Louis, Missouri 63101; Mr. Mitchell B. Dubick, Attorney, Department of Justice, Washington, D.C. 20530; Mr. Robert E. Johnson, United States Attorney, Post Office Box 1524, Fort Smith, Arkansas 71901.


Donald S. Ryan

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ERNEST RICHARD SPEED, JR.,

PETITIONER,

vs.

NO. T-76-10-C

UNITED STATES OF AMERICA,

RESPONDENT.

A F F I D A V I T

I, Robert Pierce, state on oath:

I.

I am a licensed, practicing attorney in the City of North Little Rock, Pulaski County, Arkansas.

II.

I was one of the attorneys of record for Ernest Richard Speed, Jr. at a hearing held before the Honorable Terry L. Shell, United States District Judge, in the United States District Court Room, U.S. Post Office and Court House, Little Rock, Arkansas, on Monday, November 22, 1976, at 9:30 a.m.

III.

At the conclusion of all of the testimony which was taken in this case, a conference was held with The Honorable Sam Hugh Park, Assistant United States Attorney, Western District of Arkansas, who represented the United States Government at the hearing, and Mr. Park agreed, on behalf of the United States Government, that if the facts regarding Mr. Speed's confinement in State Prison and subsequent removal by the United States Government for various hearings before the United States District Court for the Western District of Arkansas in Texarkana, Arkansas, were true,

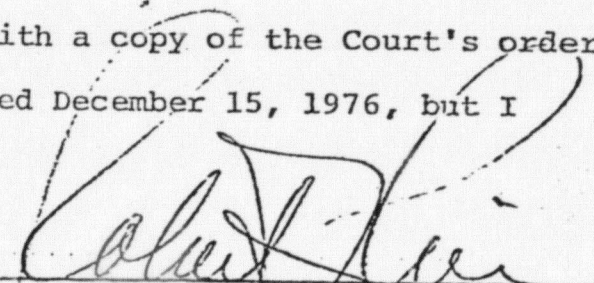
then the government was agreeable to dismissing the case, vacating the sentence, and agreeing that Mr. Speed should be set free.

IV.

I left the Court Room with the understanding that Mr. Park had made this agreement, and that Mr. Speed, would in fact, be released from the Penitentiary with the consent of the United States Government.

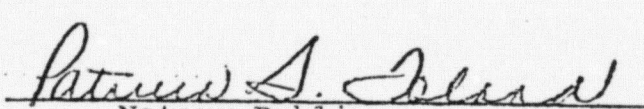
V.

I was to be furnished with a copy of the Court's order on this matter which was dated December 15, 1976, but I have not received it.


ROBERT L. PIERCE

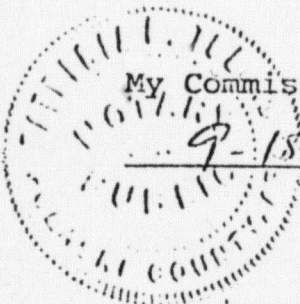
STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 15th day of April, 1977.


Notary Public

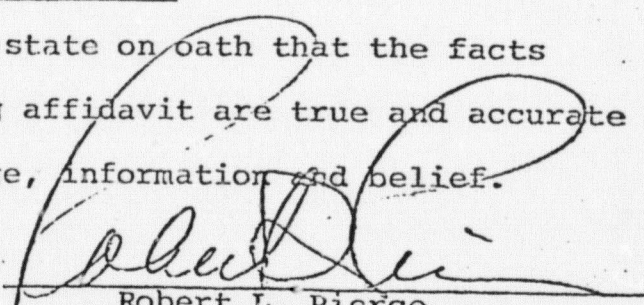
My Commission Expires:

9-18-80



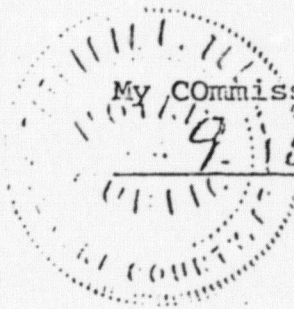
VERIFICATION

I, Robert L. Pierce, state on oath that the facts contained in the foregoing affidavit are true and accurate to the best of my knowledge, information and belief.


Robert L. Pierce

SUBSCRIBED AND SWORN TO before me, a Notary Public
on this 18th day of April, 1977.

Patricia A. Clark
Notary Public



My Commission Expires:

9-18-80

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ERNEST RICHARD SPEED, JR.

PETITIONER

v.

No. T-76-10-C

UNITED STATES OF AMERICA

RESPONDENT

AFFIDAVIT

I, Terry L. Shell, United States District Judge, hereby state:

A hearing was held before this Court in the above-styled case on Monday, November 22, 1976 at 9:30 a.m. This action was a petition for a writ of habeas corpus filed pursuant to Title 28 U.S.C. § 2255. The following grounds were alleged: (1) incompetency of petitioner; (2) denial of effective assistance of counsel; and (3) failure of the prosecution to show a factual basis for the plea of guilty. During the hearing a supplemental petition was filed in open court which had been prepared by petitioner himself. That petition alleged that the Interstate Agreement on Detainers Act, Title 18 U.S.C. App., Ark.Stat.Ann. § 43-3201, had been violated by the United States in that the United States did not comply with Article IV(e) of the Agreement in that the petitioner was removed three times from the Cummins Unit of the Arkansas Department of Correction, placed in custody of the federal government, and returned to state custody.

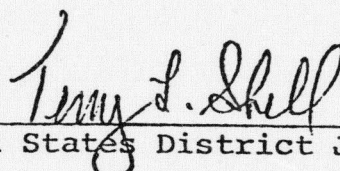
At the conclusion of the testimony, which only related to the grounds raised in the original petition; the Court recessed. At that time a conference was held with the attorneys and the Court concerning the new allegation. It is the Court's understanding that Mr. Sam Hugh Park, then Assistant United States Attorney, contacted the Department of Justice and then stated to the Court that he would enter into a consent judgment, admitting that the

United States had violated the Interstate Agreement on Detainers Act and that the writ of habeas corpus should be granted. Therefore, the Order entered by this Court does not adequately reflect that it was actually with the full consent of the United States Government.

None of the conversations concerning the ultimate outcome of this case appear in the record.

Therefore, this case should be remanded so that the Court's Order of December 15, 1976 be amended to reflect that it was, in fact, a consent judgment.

Dated this 15 day of April, 1977.


United States District Judge

CERTIFICATE OF SERVICE BY MAIL

FEB 16 1978

James S. Heimerle
VS. Attorney - Appellant
UNITED STATES OF AMERICA,
Respondent - Appellee

Case No. 77-2131

The undersigned hereby certifies that he is the (Petitioner)

(Plaintiff) (Defendant) (Appellant) in the above entitled action.

That on the 13 day of February, 19 78 he served
a copy of the attached Reply Brief - Appended papers

(Describe)

by placing said copy in a postpaid envelope addressed to the person(s)
hereinafter named, at the place(s) and address(es) stated below, ~~and~~
which is/are the last known address(es), and by depositing said en-
velope and contents in the United States Mail at the United States
Penitentiary, Atlanta, Georgia 30315.

James S. Heimerle
Box PMB 01873

United States Penitentiary
Atlanta, Georgia 30315

Addressee(s):

US Attorney - Robert B. Fiske, Jr.
U.S. Court House - Foley Square
New York N.Y. 10007